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Tan Aik Swan v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05(M)-519–10 OF 2018
NOR BEE ARIFFIN, RUZIMA CHE MOHD AND HASHIM HAMZAH JJCA
17 AUGUST 2022

C

Criminal Law — Dangerous Drugs Act 1952 — Section 39B(1)(a) — Trafficking in dangerous drugs — Whether chain of ownership or chain of custody and control of car was established — Whether failure of prosecution to call registered owner of car as witness created gap in prosecution's case — Whether proximity of accused with drugs inferred knowledge of drugs on accused — Whether there was exclusive possession of drugs — Whether Parliament had usurped judicial powers and offended principles of separation of powers, rendering s 39B(2A) unconstitutional — Whether conviction and sentence of death penalty against accused safe

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E

As a result of an inspection on a car driven by the appellant, a plastic bag with the word 'Hokkaido' was found on the front passenger seat. SP8 opened the said plastic bag and found five transparent plastic packets each containing substances suspected to be 'syabu'. Upon analysis of the drug exhibits by the chemist, SP6, it was found to contain a total of 357.1g of methamphetamine. The appellant was then charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('Act 234'). At the conclusion of the trial, the trial judge found that the appellant had failed to raise a reasonable doubt to his possession of the dangerous drugs. The appellant had also failed to rebut on a balance of probabilities the statutory presumption of trafficking under s 37(da) of Act 234. The trial judge found that the prosecution had successfully proven their case beyond reasonable doubt against the appellant. The appellant was thus convicted of the charge of trafficking under s 39B(1)(a) of Act 234 and sentenced to death. Hence the present appeal, inter alia, on the grounds that: (a) there was no exclusive possession of the dangerous drugs; (b) there was no knowledge of the dangerous drugs on the part of the appellant; and (c) there was unconstitutionality and misdirection on s 39B(2A) of Act 234.

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Held, dismissing the appeal; affirming the conviction and sentence of High Court:

I

(1) The court did not see the importance of Soh Bee Ting's evidence with regard to the sale of the said car in relation to the chain of ownership and her connection in any manner to the drugs found in the said car. The

appellant had failed to convince the court on the relevance of Soh Bee Ting's evidence to the finding of the impugned drugs. There was simply no reason for the prosecution to call Soh Bee Ting. The trial judge had analysed and appropriately dealt with the evidence on what had taken place at SP4's house and the events thereafter. Having considered all evidence led during the trial, it could not be said that the trial judge's conclusion upon the evidence was erroneous. There were no reasons to find the trial judge's reasonings flawed or his conclusion wrong. There was, therefore, no reason to disturb the finding of the trial judge (see paras 53, 57–58 & 66–67).

(2) It would not be reasonable to infer knowledge merely on the basis that the drugs were in close proximity to the appellant. It was certainly odd that the presence of the plastic bag, being where it was, did not at all raise the curiosity of the appellant as to why the plastic bag was there in his car, and to find out what the contents were as the contents would have been fairly visible in any case as the plastic bag was translucent. Therefore, the trial judge was correct in arriving at his findings that the prosecution had established a prima facie case against the appellant as charged and in asking the appellant to enter upon his defence. The appellant's defence was also considered by the trial judge and he came to the conclusion that the appellant failed to cast a reasonable doubt on the prosecution's case. The trial judge had come to the correct conclusion and there was no appealable error (see paras 69 & 71–73).

(3) The challenge on the constitutionality of s 39B(2A) of Act 234 was raised for the first time in this appeal. The submission by the appellant then, was focused on merely the interpretation of s 39B(2A). As the trial judge was never called upon to decide on the constitutionality of s 39B(2A), thus it was incorrect for the appellant to contend that the trial judge had failed to consider the same. Having considered all arguments and submissions, the learned trial judge had not misinterpreted the provisions of sub-s 39B(2A) of Act 234 (see paras 79–80 & 93).

(4) The Parliament did not encroach into the power of the court in enacting the legislative prescriptions of factors in paras (a)–(d) of s 39B(2A) of Act 234 to be considered by the court before imposing life imprisonment, as it was within their power to do so. Therefore, s 39B(2A) of Act 234 was constitutional and did not violate the doctrine of separation of power nor was there any interference with judicial function. Thus, the conviction against the appellant was safe (see paras 96–97 & 102).

[Bahasa Malaysia summary

Hasil daripada pemeriksaan ke atas kereta yang dipandu perayu, beg plastik tertera perkataan 'Hokkaido' ditemui di tempat duduk penumpang hadapan. SP8 membuka beg plastik tersebut dan menemui lima paket plastik lutsinar

setiap satu mengandungi bahan disyaki 'syabu'. Hasil analisis terhadap eksibit dadah oleh ahli kimia, SP6, ianya didapati mengandungi sejumlah 357.1g methamphetamine. Perayu kemudiannya didakwa di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta 234'). Pada akhir perbicaraan, hakim perbicaraan mendapati perayu telah gagal menimbulkan keraguan munasabah terhadap pemilikan dadah berbahaya tersebut. Perayu juga gagal untuk menyangkal imbangan kebarangkalian anggapan statutori pengedaran di bawah s 37(da) Akta 234. Hakim perbicaraan mendapati bahawa pihak pendakwaan telah berjaya membuktikan kes mereka melampaui keraguan munasabah terhadap perayu. Oleh itu, perayu telah disabitkan dengan pertuduhan pengedaran di bawah s 39B(1)(a) Akta 234 dan dijatuhi hukuman mati. Oleh itu rayuan semasa, antara lain, atas alasan bahawa: (a) tiada pemilikan eksklusif dadah berbahaya tersebut; (b) tiada pengetahuan tentang dadah berbahaya di pihak perayu; dan (c) terdapat perlanggaran perlembagaan dan salah arah pada s 39B(2A) Akta 234.

Diputuskan, menolak rayuan; mengesahkan sabitan dan hukuman Mahkamah Tinggi:

(1) Mahkamah tidak melihat kepentingan keterangan Soh Bee Ting berhubung penjualan kereta tersebut berhubung rantaian pemilikan dan kaitannya dengan apa-apa cara dengan dadah yang terdapat di dalam kereta tersebut. Perayu telah gagal meyakinkan mahkamah tentang kaitan keterangan Soh Bee Ting dengan penemuan dadah yang dipersoal. Tiada sebab untuk pihak pendakwaan memanggil Soh Bee Ting. Hakim perbicaraan telah menganalisis dan menangani keterangan dengan sewajarnya tentang apa yang berlaku di rumah SP4 dan kejadian selepas itu. Setelah mempertimbangkan semua keterangan yang dikemukakan semasa perbicaraan, tidak boleh dikatakan bahawa kesimpulan hakim perbicaraan atas keterangan tersebut adalah terkhilaf. Tidak ada sebab untuk mendapati alasan hakim perbicaraan cacat atau kesimpulannya salah. Oleh itu, tiada sebab untuk mengganggu keputusan hakim perbicaraan (lihat perenggan 53, 57–58 & 66–67).

(2) Ia adalah tidak munasabah untuk menyimpulkan pengetahuan semata-mata berdasarkan bahawa dadah tersebut berada berdekatan dengan perayu. Sudah tentu aneh bahawa kehadiran beg plastik tersebut, berada di tempatnya, sama sekali tidak menimbulkan rasa ingin tahu perayu mengapa beg plastik tersebut berada di dalam keretanya, dan untuk mengetahui apakah kandungannya kerana kandungannya akan kelihatan agak ketara dalam apa jua keadaan kerana beg plastik tersebut lutsinar. Oleh itu, hakim perbicaraan adalah tepat dalam membuat keputusan bahawa pihak pendakwaan telah membuktikan kes prima facie terhadap perayu seperti yang didakwa dan meminta perayu membela diri. Pembelaan perayu juga telah dipertimbangkan oleh hakim perbicaraan dan beliau membuat kesimpulan bahawa perayu gagal

menimbulkan keraguan munasabah terhadap kes pendakwaan. Hakim perbicaraan telah membuat kesimpulan yang betul dan tidak ada kekhilafan yang boleh dirayu (lihat perenggan 69 & 71–73).

(3) Cabaran terhadap keperlembagaan s 39B(2A) Akta 234 dibangkitkan buat pertama kali dalam rayuan ini. Penghujahan oleh perayu sebelumnya, hanya tertumpu kepada tafsiran s 39B(2A). Oleh kerana hakim perbicaraan tidak pernah dipanggil untuk memutuskan perlembagaan s 39B(2A), maka adalah salah bagi perayu untuk berhujah bahawa hakim perbicaraan telah gagal mempertimbangkan perkara yang sama. Setelah mempertimbangkan semua pendapat dan hujahan, hakim perbicaraan yang bijaksana tidak menyalahtafsirkan peruntukan sub-s 39B(2A) Akta 234 (lihat perenggan 79–80 & 93).

(4) Parlimen tidak menceroboh kuasa mahkamah dalam menggubal preskripsi faktor perundangan dalam perenggan (a)–(d) s 39B(2A) Akta 234 untuk dipertimbangkan oleh mahkamah sebelum mengenakan hukuman penjara seumur hidup, kerana ia adalah dalam kuasa mereka untuk berbuat demikian. Oleh itu, s 39B(2A) Akta 234 adalah berperlembagaan dan tidak melanggar doktrin pengasingan kuasa dan tidak ada sebarang gangguan terhadap fungsi kehakiman. Oleh itu, sabitan terhadap perayu dikekalkan (lihat perenggan 96–97 & 102).]

Cases referred to

Abdul Kahar bin Othman v PP [2018] 2 SLR 1394; [2018] SCGA 70, CA (refd)

Bursa Malaysia Securities Bhd v Mohd Afrizan bin Husain [2022] 3 MLJ 450; [2022] 4 CLJ 657, FC (refd)

Fakhrurrazi Hasan v PP [2015] MLJU 2018; [2017] 2 CLJ 125, FC (refd)

Khairuddin bin Hassan v PP [2010] 6 MLJ 145, FC (refd)

Kok Wah Kuan v PP [2007] 5 MLJ 174, CA (refd)

Letitia Bosman v PP and other appeals (No 1) [2020] 5 MLJ 277; [2020] 5 MLRA 636, FC (folld)

PP v Mehrdad Rahmati Yadollah (Irn) & Anor and other appeals [2020] MLJU 1795; [2020] MLJU 1823; [2020] MLRAU 311, CA (folld)

Parlan bin Dadeh v PP [2008] 6 MLJ 19; [2009] 1 CLJ 717, FC (refd)

Prabagaran a/l Srivijayan v PP and other matters [2017] 1 SLR 173, CA (refd)

Taza bin Tarji v PP and another appeal [2020] MLJU 1822; [2020] MLJU 1794; [2020] MLRAU 312, CA (folld)

Legislation referred to

Criminal Procedure Code ss 180(3), 180A(2)

Dangerous Drug Act 1952 ss 37(da), 39B, 39B(1)(a), (2), (2A), (2A)(a), (2A)(b), (2A)(c), (2A)(d), First Schedule

Federal Constitution arts 5, 8, 121

Misuse of Drugs Act 1973 [SG] s 33B

Penal Code s 302

Appeal from: *Public Prosecutor v Tan Aik Swan* [2018] MLJU 1484 (High Court, Johor Bahru)

Amer Hamzah Arshad (with Joshua Tay and New Sin Yew) (Amerbon) for the appellant.
Mohd Dusuki bin Mokhtar (with Mohd Fairuz bin Johari) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Nor Bee Ariffin JCA:

INTRODUCTION

[1] The appellant was charged for trafficking in dangerous drugs. The charge reads:

> Bahawa kamu pada 28.9.2016 jam lebih kurang 10.45 malam, bertempat di tempat letak kereta No 386, Jalan Permas 10/5, Taman Permas Jaya, di dalam Daerah Johor Bahru, di dalam Negeri Johor Darul Ta'zim telah didapati memperedarkan dadah berbahaya, iaitu sejumlah berat bersih 357.1 gram Methamphetamine dan dengan itu kamu telah melakukan satu kesalahan di bawah sekyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

THE PROSECUTION'S CASE

[2] On 28 September 2016 at around 10pm, SP8 and five members of a police raiding party from the Narcotics Unit, Criminal Investigation Department, IPK Johor arrived in two cars at Jalan Permas 10/5, Taman Permas Jaya, Johor Bahru, Johor (place of incident), and conducted an observation on the area for about 45 minutes from a distance of around 20 to 30ft.

[3] At around 10.45pm, SP8 witnessed a Proton Wira car bearing registration No JFQ 8494 (the said car) driven by the appellant came to a stop in front of the Quan An Vietnam Nguyen Restaurant at 386, Jalan Permas 10/5, Taman Permas Jaya, Johor Bahru, Johor.

[4] SP8 and the raiding party then drove the vehicles they were in and blocked the car driven by the appellant. When SP8 introduced himself as a police officer, the appellant opened the door of the car and ran away but was apprehended at a distance of 10ft after a struggle ensued.

[5] SP8 conducted a physical check on the appellant but found nothing

incriminating. SP8 then brought the appellant to the said car to conduct an inspection.

[6] As a result of the inspection on the said car, a plastic bag with the word 'Hokkaido' (exh P6(1)) was found on the front passenger seat. The said plastic bag was closed. SP8 opened the said plastic bag and found five transparent plastic packets (exhs P6(1)(A)–P6(1)(E)) each containing substances suspected to be 'Syabu'.

[7] After the suspected drugs were discovered, the appellant reacted aggressively and tried to flee again but was again successfully restrained by the police raiding party.

[8] Upon further examination of the said car, SP8 found three financial statements, two payment receipts and one access card (exhs P5(1)–5(6)) located on the dashboard of the said car. Also seized were a set of keys and a remote (P16(1)) in the ignition.

[9] SP8 seized all the exhibits and prepared a search list. The appellant was placed under arrest and brought to the Narcotics Unit, Criminal Investigation Department, IPK Johor for further action.

[10] The exhibits were duly handed over to SP9, the investigating officer, who then sent the exhibits to the Chemistry Department for analysis. Upon analysis of the drug exhibits by the chemist, SP6, it was found to contain a total of 357.1g nett of methamphetamine. SP6 confirmed that the drugs were dangerous drugs and listed in the First Schedule to the Dangerous Drug Act 1952 (Act 234). SP6's findings were also reflected in the Chemist Report (exh P12).

FINDINGS OF TRIAL JUDGE

[11] The prosecution had made out a prima facie case against the appellant. Firstly, the prosecution had proven the nature and weight of the dangerous drugs forming the subject matter of the charge against the appellant. There was no break in the chain of exhibits from the time impugned drugs were seized during the raid until the same drugs were produced in court at trial. Secondly, the appellant was in possession of the dangerous drugs. Thirdly, the appellant was trafficking in the drugs.

POSSESSION

[12] The learned trial judge found that the appellant had actual possession of the dangerous drugs as opposed to presumed possession of the dangerous

drugs. The learned trial judge's reasons why he found that the appellant had the necessary possession and knowledge are as follows.

[13] The evidence showed that the appellant had been in possession of the said car for at least a month or so if not more before the arrest.

[14] The appellant was the only person in the car at the time of the arrest. The plastic bag (exh P6(1)) containing the dangerous drugs were found on the front passenger seat. There were also several documents found in the said car. Three of these were bills or statements for water bills and a sinking fund for Unit C-16–03, D' Ambience Residences Blok C-16–03, Jalan Permas 2, Bandar Baru Premas Jaya, 81750 Masai, Johor dated 12 March 2016, 9 April 2016 and 30 June 2016 (exhs P5(1), (2) and (3) respectively).

[15] His Lordship accepted the evidence of SP5, a car mechanic whose workshop is located in front of Jalan Permas 2, Permas Jaya which is the main road leading to the D'Ambience Residences ('the condominium'), that the appellant resided at the condominium because he had seen the appellant going in and out of the condominium and the said car was usually parked at the condominium. SP5 had gone there on one occasion to jump start the said car. SP5 testified that every time the appellant passed by his workshop, the appellant would sound his car horn at him.

[16] According to SP5 and SP9, the investigating officer, the address stated in these documents was the residence of the appellant. Also discovered in the car was a receipt from Dr Cermin Sdn Bhd dated 15 June 2016 (exh P23) in the name of the appellant found under the passenger seat. The learned trial judge held that all these facts raised the reasonable inference that the appellant was using the said car for at least a few months before the date of arrest on 28 September 2016.

[17] There was finding of facts made after analyzing the evidence of SP2, SP3, SP4, SP5 and SP7, that although there was no formal documentation to show that the appellant was the registered owner of the said car, all the circumstances pointed to the appellant as the purchaser of the said car on 12 June 2016 and after the purchase, the car was used by him solely.

[18] SP5 said while using the car, the appellant had met with two accidents. The first accident was a month after the purchase of the said car while the second accident took place two or three weeks after the first accident.

[19] SP5 said that on both occasions, it was the appellant who sent the said car for repairs to his shop. The appellant would buy the car spare parts and send the car to him to perform the repairs. SP5 said that the repairs resulting from

A the first accident took more than a day to repair while the repairs resulting from the second accident took around a week. SP5 said that he was unaware whether there were any items left in the said car when it was sent to him. After the repair works were done, the appellant took the car back.

B **[20]** The defence's contention that the said car was taken from SP5's shop on 28 September 2016 was untenable. If the purchase of the said car was on 12 June 2016, the car would have been repaired and retrieved after the second repair before 28 September 2016.

C **[21]** Element of actual possession was proven by the fact that the said plastic bag containing the dangerous drug were in close proximity to the appellant, being as it was, on the front passenger seat. Reliance was made on the Federal Court case of *Khairuddin bin Hassan v Public Prosecutor* [2010] 6 MLJ 145.

D **[22]** Based on the investigation, SP9 confirmed that after each time the said car was repaired. SP5 would hand over the said car back to the appellant and that it was not left behind at the workshop.

E **[23]** Thus, the learned trial judge dismissed the appellant's suggestion that although the appellant saw the bag on the front passenger seat, he assumed that the packages were spare parts that belonged to the workshop. If the suggestion was true, it was most improbable that the appellant would not be curious to at least find out what was in the bag as anyone looking into the bag would F immediately have noticed something amiss because the dangerous drug were in a transparent packaging.

[24] It was suggested to SP8 during cross-examination, that the dangerous drug was placed in the said car by a gang called the '360 Gang'. SP8 replied that G he did not know. The learned trial judge said that beside this bare assertion, there was nothing to indicate that this was so. It was improbable that anyone else would have placed the drug in the said car as the key and the remote (exh P16) was seized from the appellant during the examination of the said car. Furthermore, there was nothing to show that a police report was lodged that H the car was broken into before the arrest.

[25] The appellant also put his case that the appellant had on that day at 5pm gone out to Permas Jaya to meet with his girlfriend. SP9 said that this fact was never mentioned to her by the appellant during the course of investigation.

I **[26]** The learned trial judge further held that the attempts by the appellant to escape not once but twice, the second occasion being accompanied by aggression, was indicative of his knowledge of the existence and the nature of the dangerous drug in the plastic bag.

[27] As the weight of the drugs exceeded the statutory minimum in s 37(da) of Act 234, the learned trial judge found that the statutory presumption had arisen against the appellant. It was thus incumbent on the appellant in order to secure an acquittal to rebut such presumption on a balance of probabilities.

[28] The learned judge held that upon a maximum evaluation of the evidence, he found that the prosecution had proven a prima facie case against the appellant in respect of the charge as preferred pursuant to s 180(3) of the Criminal Procedure Code ('the CPC').

[29] The appellant was ordered to enter his defence.

THE DEFENCE CASE

[30] The appellant denied that he had purchased the said car. It was purchased by Vinod (SP7) and he had merely borrowed the said car on the date of the incident.

[31] The appellant said the first time he saw the car was on 12 June 2016 at Masai. He had gone there with SP7 in order to view the car because he had wanted to buy a car. The appellant said that when he saw the car, he was not satisfied with its condition. The appellant said it was SP7 that was keen on the car but he did not have enough money to buy the car as he only had RM4,000. The appellant then lent SP7 RM2,000.

[32] The appellant said car was usually used by SP7 and himself.

[33] The appellant said the car was involved in two accidents, the second of which was on 20 August 2016. At the time the car was driven by him. He handed the car to SP7 who handed the car to SP5 for repairs. The car was repaired within nine days.

[34] The appellant's case was that in the morning of the date of incident, a friend named Ah Chai who worked in Singapore called him to have tea with him that night. The appellant did not know his friend's actual name. The appellant told his friend that he had no car as it was still under repair.

[35] On the same date the appellate called SP5 in whose possession the car was at that time, and asked whether he could take the car on that day. SP5 said he could do so between 5pm to 6pm. The appellant then took the car around 5pm to 6pm. The costs of repair was borne by Vinod but he did not know how much.

[36] Thereafter, he fetched his girlfriend to have dinner together.

[37] The appellant said when he took the said car, he noticed there were three to four packages in the car but did not know where they came from. At the time he picked up his girlfriend, the packages were in the middle of the car near the handbrakes and his girlfriend sat in the front passenger seat. He did not know the content of the packages nor did he know who they belonged to. He stated that he thought that the packages were spare parts from the workshop and he therefore ignored them. The appellant said after dinner, he sent his girlfriend back and arranged to meet his friend at Permas Jaya at around 8pm to 9pm. Before he could meet up with Ah Chai, he was arrested by the police. The police conducted an examination of the car and found some white substance that were drugs. The appellant maintained the drugs did not belong to him.

[38] After the appellant was arrested, his brother Tai Aik Chai came to see him and informed him that the dangerous drugs were planted by members of the '360 Gang' who had a misunderstanding with him, namely Tai Aik Chai.

[39] The appellant said his brother was murdered by the said '360 Gang' on 17 December 2017 at around 7pm.

FINDINGS OF THE TRIAL JUDGE

[40] The learned trial judge considered the issue on proximity of the said drugs to the appellant and held that the plastic bag containing the said dangerous drugs was in close proximity to the appellant as it was in the middle of the car near the handbrakes at the front passenger seat. Reliance was made on *Khairuddin bin Hassan v Public Prosecutor* [2010] 6 MLJ 145 where the apex court held that the physical proximity of the accused to the dangerous drugs was a factor to be considered in determining that the accused was in actual possession of the drugs found in the said car. The learned trial judge concluded that the presence of the drugs found in the plastic bag without plausible explanation from the appellant gave rise to a strong inference that he had knowledge that the plastic bag contained drugs.

[41] The appellant's had attempted twice to flee as mentioned earlier. His conduct in attempting to escape would fairly raise the inference that the appellant had knowledge of the existence and nature of the dangerous drugs in the plastic bag.

[42] The fact that the appellant did not know Ah Chai's full name and could not recollect the time Ah Chai contacted him, suggested that the appellant's defence in that regard was fabricated.

[43] The prosecution pointed out that during the course of the prosecution's case, both SP5 and SP7 were not cross-examined regarding the defence's version that the said car was purchased with the sum of RM4,000 from SP7 while the appellant merely assisted in the purchase by lending RM2,000 to SP7 who was short of money to buy the car. Additionally, SP7 was also not cross-examined regarding the allegation that it was SP7 that sent the car to SP5 for repair work and not the appellant himself. SP5 too was not cross-examined about the package left near the car hand brakes which the appellant thought contained car spare parts. The learned judge was of the view that such failure by the defence to cross-examined the prosecution witnesses on matters central to the defence case but raised for the first time during the defence case rendered these parts of the defence to be an afterthought.

[44] There was a contradiction in the defence of the appellant. During SP5's testimony, the defence suggested that the appellant retrieved the car after the second accident on 28 September 2016 whereas the appellant in his evidence said that the car was sent to SP5 on 20August 2016 and retrieved 9 days later on 29 August 2016. This contradiction did little to lend credibility to the defence of the appellant.

[45] The learned judge found that all reasonable inferences pointed to the complete and unrestricted use of the said car. This was because the appellant testified that he resided at the condominium. Exhibits P5(1)-P5(5) bore an address at the said condominium. Further to that, a receipt from Dr Cermin Sdn Bhd (exh P23) dated 15 June 2016 in the appellant's name was found under a seat in the said car. If it was true that SP7 had purchased the said car, it did not stand to reason why would the document be in the name of the appellant a mere three days after the car was purchased from SP4 on 12 June 2016. No document at all were found in the said car to link SP7 to it.

[46] The argument that the appellant had on that day of the incident gone out at 5pm to fetch his girlfriend for dinner was, as testified by SP9, never mentioned during the course of investigation. Thus, this raised the issue of no 'Alcontara notice' being furnished by the appellant. The learned trial judge found that the police was not to be faulted for not pursuing this line of investigation.

[47] At the conclusion of the trial, the learned trial judge found that the appellant had failed to raise a reasonable doubt to his possession of the dangerous drugs. The appellant had also failed to rebut on a balance of probabilities the statutory presumption of trafficking under s 37(da) of Act 234. The learned trial judge found that the prosecution had successfully proven their case beyond reasonable doubt pursuant to s 180A(2) of the CPC against the appellant. The appellant was thus convicted of the charge of trafficking

under s 39B(1)(a) of Act 234 and sentenced to death. Hence this appeal.

THE APPEAL

[48] The appellant raised 12 grounds in support of his appeal which can be divided broadly into the areas as canvassed by learned counsel in his written and oral submissions:

(a) no exclusive possession of the dangerous drugs;

(b) knowledge of the dangerous drugs on the part of the appellant; and

(c) unconstitutionality and misdirection on s 39B(2A) of Act 234.

[49] On the issue in paras (a) and (b), amongst others, it was submitted that the chain of ownership or chain of custody and control of the said car was not properly established by the prosecution. The issue relating to the actual ownership and use of the said car was highly questionable. There were material contradictions in the evidence of the prosecution witnesses. While the prosecution posits that the said car was purchased, owned and being used by the appellant, the evidence surrounding the sale of the vehicle suggested otherwise. The learned trial judge only focused on evidence of the prosecution's witnesses while material witnesses were not called.

[50] It is to be observed that notwithstanding the appellant grounds of appeal that the learned trial judge had misdirected himself on burden of proof at the end of the defence's case (para 2), had erred in failure to find that there was reasonable doubt in the prosecution's case at the end of the defence's case (para 3) and had failed to consider all the evidence objectively and give the appellant the benefit of the doubt by drawing the inference most favourable for the appellant (paras 6 and 10), learned counsel for the appellant submitted that the appellant did not intend to submit on the defences by the appellant as the prosecution's threshold had not been met. Thus the conviction was not safe.

OUR FINDINGS

No exclusive possession of the dangerous drugs

[51] It was submitted by learned counsel that the chain of ownership or chain of custody and control of the car was not properly established by the prosecution. Following the prosecution's narrative, the said car was registered under the name of Soh Bee Ting. She was never called to give evidence but was merely offered as a witness at the end of the prosecution case. Instead, her brother was called (SP2) who testified that he bought the said car for his daughter's use. SP2 then sold the car to SP3.

[52] Learned counsel submitted that considering Soh Bee Ting was the registered owner of the car, it was imperative for the prosecution to call her to close the gap in relation to the ownership of the car, and by extension, the drugs found in the car. Therefore, since Soh Bee Ting's evidence was material to the unfolding of the prosecution's narrative, the prosecution was duty bound to call her as a witness. Merely offering such witness would not absolve the prosecution from its duty to prove its case. This aspect, according to learned counsel, was not considered by the learned trial judge as there was no assessment or reasoning provided in relation to her role.

[53] We do not see the importance of Soh Bee Ting's evidence with regard to the sale of the said car in relation to the chain of ownership and her connection in any manner to the drugs found in the said car.

[54] It was not indisputable that Soh Bee Ting was the registered owner of the said car. During the prosecution case, evidence was led to show how the purchase on 12 June 2016 took place.

[55] SP2 testified that he purchased the said car some time in 2011 but had it registered in his sister's name, Soh Bee Ting because he was unable to secure a loan. The said car was to be used by his daughter Soh Siew Hue. In early February 2016, he traded in the said car at Sykt Proton in Masai to purchase a new car, a Proton Iriz. At Sykt Proton Masai, he was dealing with SP3, Mohd Khairul Azhar bin Jumaat. The said car was traded in for RM5,000 which was used as deposit for the new car Proton Iriz with registration number JRG 7711. SP2 gave the registration card of the said car and the key (the car had only one key) to SP3. SP2 said he left no item behind when he handed over the said car to SP3. SP3 was not cross-examined on his evidence. Thus, the appellant had accepted that the car was not used by Soh Bee Ting even though she was the registered owner, but by Soh Siew Hue. Soh Bee Ting only lent her name to enable SP2 to purchase the said car. And there was no item left behind in the car. It is also crucial to note that SP9 said from her investigation, Soh Bee Ting had never used the said car since the purchase in 2011.

[56] SP3 testified that he received the said car from SP2 in good condition. After he received the said car, he sold the car to SP4, Wan Mohd Norul Azmi bin Wan Abdullah. SP3 confirmed that the said car was in good order before he handed it over to SP4 with the said car registration card and the key. He had it properly checked and cleaned as seen from the passage below:

> S: Semasa serahan tersebut dibuat pada Encik Wan ya, bagaimana keadaan dalam kereta tersebut?
>
> J: Kebiasaannya sebelum saya jual kereta, saya akan pergi ke carwash untuk cuci kereta. Saya akan check satu-persatu contoh macam tyre-spare, jack dan tools dengan bahagian enjin dan dalamannyalah, baru saya pas dekat use car.

S: Jadi bahagian dalam bagaimana keadaan?

J: Keadaan semua okeylah macam biasa.

S: Macam biasa ya? Ada barang-barang tak?

J: Tak ada. Clear.

[57] SP3 was not cross-examined on his evidence. Thus, the appellant had accepted that there was no item left in the car. There is simply no reason for the prosecution to call Soh Bee Ting.

[58] Learned counsel failed to convince us on the relevance of Soh Bee Ting's evidence to the finding of the impugned drugs.

[59] The starting point on the issue of who purchased the car and who had the use and control of the said car was the transaction that took place on 12 June 2016 at around 7pm between SP4, SP5, SP7 and the appellant at SP4's house at Kota Masai. This was dealt with by the learned trial judge at paras 35–45 of his grounds of judgment (GOJ).

[60] We are of the view that the evidence of SP4, SP5 and SP7 showed that the purchaser of the said car was the appellant and it was not SP7 and that the said car was not used by both he and SP7 as contended by the appellant but by him alone. Evidence clearly showed that SP7 and the appellant did not know each other and it could not be that they were sharing the car.

[61] In 2016, SP7 worked as a car re-possessor. He knew SP4 who had a car to sell. SP7 knew SP5. When he had his car serviced at SP5's workshop, he told SP5 that he had a friend who wanted to sell a car.

[62] SP5 told SP7 that he had a friend who wanted to buy a car. SP7 made arrangement to meet SP4 on 12 June 2016 at SP4's house at Kota Masai. He arrived first, SP5 came later with the appellant SP5 told him that the appellant wanted to buy a car. SP7 said he only knew the appellant on the day of the meeting. He had never contacted the appellant and he did not have his contact number. The appellant never spoke to him.

[63] SP4 described the appellant as a customer brought by SP7 to purchase the car. SP5 testified that the appellant had wanted to buy a second hand car and they were there at SP4's house together with SP7 on 12 June 2016 for that purpose. SP4 told SP7 in his house that the price was for RM6,000 on the road including changing the ownership of the car. SP5 and the appellant at that time were outside the house, checking and examining the car. SP7 then told SP5 that the price was RM6,000 on the road. SP5 and the appellant were then seen discussing. Then SP5 told him that the price was accepted. After they came to

an understanding regarding the extra payment on JPJ's fee, SP7 saw SP5 took the cash from the appellant, SP5 then gave him the cash RM6,000 and he passed the cash to PW4. SP7 said he passed the cash given to him by SP5 to SP4 because he was the one who recommended the sale. After the cash was given to SP4, SP4 handed the registration card of the car and the key to him and he passed them to SP5. The said car was not sold to him but was sold to the appellant. The said car was driven by the appellant who left with SP5. SP7 drove his own car. The allegation that SP7 was the purchaser of the car solely premised on the receipt issued by SP4 is not tenable.

[64] SP7 explained why the receipt was in his name. As PW4 had told him that the receipt was just to for his own record that there was the sale, he then decided that the receipt could use his NRIC. SP7 said that at the time the receipt was written, the appellant had already left with SP5.

[65] A point to note is that given the aforesaid evidence of SP7 during the examination in chief, SP7 was only asked, during the cross-examination, about the receipt that was issued in his name.

[66] The learned trial judge had canvassed the issue on why there was no change of name of the owner of the car. We have no reason to disturb his findings of fact.

[67] Quite clearly, the outcome of this issue on ownership and usage of the car turned primarily on the findings of fact. The learned judge had analyzed and appropriately dealt with the evidence on what had taken place at SP4's house and the events thereafter. Having considered all evidence led during the trial, it cannot be said that the learned trial judge's conclusion upon the evidence was erroneous. We do not find his reasonings flawed or his conclusion wrong. There is no reason to disturb the finding of the learned trial judge.

Knowledge of the dangerous drugs

[68] We are of the considered view that the grounds raised as regards no exclusive possession of the said dangerous drugs and lack of knowledge of the dangerous drugs on the part of the appellant, had been appropriately considered by the learned trial judge at the end of the prosecution's case. The outcome of this issue again turned primarily on the findings of fact.

[69] The appellant did not dispute that the impugned drugs were found in close proximity to the appellant. Learned counsel relied on *Fakhrurrazi Hasan v Public Prosecutor* [2015] MLJU 2018; [2017] 2 CLJ 125 to support the contention that that mere proximity of the appellant with the drugs without any additional other evidence did not mean that he had knowledge of the

drugs. In addition, learned counsel submitted that *Khairuddin bin Hassan*, can be distinguished from the present case as it involved the drug cannabis which emits a strong and distinct odour and especially if it was kept in an enclosed area such as a car. Such odour would have alerted a person's suspicion. Unlike cannabis, the drugs in the present case ie methamphetamine does not possess similar characteristics. Thus, it would not be reasonable to infer knowledge merely on the basis that the drugs were in close proximity to the appellant.

[70] We are unable to agree. On the first point, in *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717, the Federal Court held that:

> Proof of knowledge is very often a matter of inference. The material from which the inference of knowledge can be drawn varies from case to case. It would be sufficient for the prosecution to prove facts from which it could properly be inferred that the accused had the necessary knowledge.
>
> In the present case, the plastic containing the impugned drugs was within his full view and reach. As submitted by the respondent, the appellant was actually caught red handed in possession of the impugned drugs.

[71] On the second point, even if it is true that methamphetamine does not emit strong odour like cannabis, it is certainly odd that the presence of the plastic bag, being where it was, did not at all raise the curiosity of the appellant as to why the plastic bag was there in his car, and to find out what the contents were as the contents would have been fairly visible in any case as the plastic bag was translucent.

[72] We therefore hold that the learned trial judge was correct in arriving at his findings that the prosecution had established a prima facie case against the appellant as charged and in asking the appellant to enter upon his defence.

[73] The appellant's defence was considered by the learned trial judge and he came to the conclusion that the appellant failed to cast a reasonable doubt on the prosecution's case. We have examined the evidence before us and we find the learned trial judge had come to the correct conclusion. We find there is no appealable error.

[74] In the High Court, before proceeded to sentence the appellant, the learned trial judge had invited the defence and the prosecution to submit on the provisions of sub-s 39B(2A) of Act 234.

[75] Learned counsel submitted that the appellant had fulfilled the conditions in s 39B(2A)(a), (b) and (c) and para (d) was not mandatory.

[76] The learned DPP submitted that para (d) was mandatory and must be

read conjunctively with either para (a), (b) or (c) or all of the above. The condition in para (d) was not fulfilled by the appellant.

[77] The learned trial judge after considering the provisions of the law, and the Hansard of 30 November 2017, concluded that a plain reading of s 39B(2A) indicates that paras (a)–(c) are meant to be read disjunctively while para (d) must be read conjunctively with either of the requirements in paras (a)–(c). The phrase 'and' just before para (d) makes it clear that para (d) is mandatory. The learned trial judge found nothing in evidence to suggest that the requirement under para (d) was satisfied and he found that there was no material upon which he could exercise his discretion.

[78] He therefore sentenced the appellant to be hanged by the neck until he is dead.

Interpretation and Constitutionality of s 39B(2A) of Act 234

[79] It is important to point out that the challenge on the constitutionality of s 39B(2A) was raised for the first time in this appeal.

[80] The record of proceeding on 16 October 2018 (*Rekod Rayuan Jld* 2(1) at pp 390–397) showed that the same was not raised by learned counsel for the court's consideration. The submission by the learned counsel then, was focused on merely the interpretation of s 39B(2A). As the learned judge was never called upon to decide on the constitutionality of s 39B(2A), thus it is incorrect for the appellant to contend that the learned trial judge had failed to consider the same.

[81] It is to be recalled that there were amendments made to s 39B of Act 234 where sub-s (2) was substituted with a new sub-s (2) and a new sub-s (2A) was introduced vide Act A1558 with effect from 15 March 2018.

[82] The substituted sub-s (2) reads:

> (2) Any person who contravenes any of the provisions of subsection (1) shall be guilty of an offence against this Act and shall be punished on conviction with death or imprisonment for life and shall, if he is not sentenced to death, be punished with whipping of not less than fifteen strokes.

[83] The new sub-s 39B(2A) of Act 234 reads:

> (2A) In exercising the power conferred by subsection (2), the Court in imposing the sentence of imprisonment for life and whipping of not less than fifteen strokes, may have regard only to the following circumstances:

A
(a) there was no evidence of buying and selling of a dangerous drug at the time when the person convicted was arrested;

(b) there was no involvement of agent provocateur;

(c) the involvement of the person convicted is restricted to transporting, carrying, sending or delivering a dangerous drug; and

B
(d) that the person convicted has assisted an enforcement agency in disrupting drug trafficking activities within or outside Malaysia.

C
[84] There are two issues raised in this appeal as regards the provisions of s 39B(2A), namely, the judicial interpretation of the law and its constitutionality.

D
[85] Learned counsel made it categorically clear from the onset for the sake of clarity, that it was not the contention of the appellant that Parliament was not competent to prescribe a mandatory or a range of punishment for an offence.

E
[86] The crux of the appellant's challenge was that s 39B(2A) which prescribed a mandatory and exhaustive list of factors to be considered by the court before imposing life imprisonment, had unnecessarily shackled and restricted the judicial power and function of the courts to consider other relevant factors during sentencing. In doing so, the Legislature had encroached upon or usurp into the judicial powers of the courts and therefore had offended
F
the principle of separation of powers which forms the basic structure of the Federal Constitution ('the FC'), thereby rendering s 39B(2A) unconstitutional. The said provisions was said to offend art 121 and also arts 5 and 8 of the FC. Learned counsel cited several cases in support of his
G
contention that sentencing which forms an integral part of the criminal process falls within the realm of judicial powers, one of which was the Court of Appeal case of *Kok Wah Kuan v Public Prosecutor* [2007] 5 MLJ 174. Accordingly, the said provision ought to be struck down as unconstitutional and declared void.

H
[87] Learned counsel submitted that if sub-s 39B(2A) is struck down as unconstitutional, the court then will decide whether the sentence to be imposed on the appellant is death or life imprisonment in accordance with sub-s 39B(2).

I
[88] The learned DPP submitted that the issue of the unconstitutionality of sub-s 39B(2A) and misdirection of the court did not arise. The learned trial judge had correctly construed the provisions of the law. The conviction against the appellant was safe and the sentence of death penalty meted against the appellant was a sentence according to the law.

[89] On the interpretation point, we noted that a number of decisions have been handed down by our Court of Appeal on the judicial interpretation and application of sub-s 39B(2A) of Act 234 including *Public Prosecutor v Mehrdad Rahmati Yadollah (Irn) & Anor and other appeals* [2020] MLJU 1795; [2020] MLJU 1823; [2020] MLRAU 311 and *Taza bin Tarji v Public Prosecutor and another appeal* [2020] MLJU 1822; [2020] MLJU 1794; [2020] MLRAU 312.

[90] We adopt the majority judgment in *Mehrdad*, and *Taza*, as the true interpretation of sub-s 39B(2) and (2A). We wish to add that applying the purposive approach, where the interpretation of an Act is be undertaken with the purpose and object of the Act in mind (Federal Court decision in *Bursa Malaysia Securities Bhd v Mohd Afrizan bin Husain* [2022] 3 MLJ 450; [2022] 4 CLJ 657), the following statements by the Minister Dato' Sri Azalina Othman Said as contained in the Hansard dated 30 November 2017 demonstrated clearly that the purpose and object of enacting s 39B(2) and 39B(2A) of Act 234 was to 'memperkasakan agensi penguatkuasaan dalam memerangi pengedaran dadah dan melindungi masyarakat'. We reproduced relevant excerpts of the Hansard:

> Yang Berhormat tanya saya tentang perkataan 'and' dalam hujung seksyen 39B(2A)(d). Dasar yang telah ditentukan ialah supaya perenggan (d) menjadi ssesuatu yang kehendak kepada mandatori iaitu perlu dipenuhi sekiranya mahkamah ingin mempertimbangkan untuk menjatuhkan hukuman penjara seumur hidup.
>
> Dalam hal ini, (a), (b) dan (c)–(a), (b), (c) dibaca secara *disjunctive* tetapi akan dibaca secara *conjunctive* dengan (d). Maknanya (d) itu adalah keperluan utama untuk hakim menggunakan kuasa budi bicara.
>
> Yang berhormat tanya saya tentang definisi enforcement agency, saya rujuk kepada fasal yang ada di sini yang mana pindaan ini menyebutkan (2C) sebagai *purpose of subsection (2A) and (2B*) dengan izin, '*enforcement agency*' means — sekarang (2C) ini akan menjadi (2B) kepada pindaan nanti. '*The Royal Malaysia Police, the National Anti-Drugs Agency, the Royal Malaysian Customs Department, the Malaysian Maritime Enforcement Agency and any other agency as may be determined by the Minister'.* Ini jawapan yang telah dinyatakan dalam pindaan ini.
>
> Yang Berhormat Bagan Serai pula mengatakan apakah maksud penjara seumur hidup. Menurut seksyen 3, *Criminal Justice Act 1953*, penjara seumur hidup bermaksud satu tempoh pemenjaraan selama 30 tahun. Yang Berhormat juga menanyakan hukuman mati yang diperuntukkan tidak berkesan menghalang pengedaran dadah perlu dimansuhkan. Dadah masih menjadi musuh nombor satu negara. Walaupun ramai pengedar dadah yang disabitkan dan dihukum mati oleh mahkamah, pengedar-pengedar daripada sindiket-sindiket dadah masih menjalankan aktiviti mereka kerana pulangan yang amat tinggi. Pemansuhan hukuman mati bukan lah penyelesaian kepada masalah dadah ini.
>
> Walau bagaimanapun, *dengan pindaan ini, ia akan memperkasakan lagi agensi*

> *penguatkuasaan dalam memerangi pengedaran dadah. Tertuduh yang membantu memberikan maklumat kepada agensi penguatkuasaan akan diberikan hukuman penjara seumur hidup dan sebatan. Maka dengan pindaan ini, kerajaan telah mengambil satu strategi baru dalam memerangi pengedaran dadah dan melindungi kepentingan masyarakat.* Jika dilihat statitik pihak penjara dari tahun 2000 hingga tahun 2017, seramai 113 orang yang telah dikenakan hukuman mati di bawah seksyen 39B DDA 1952, hanya 11 orang yang telah digantung iaitu 82 peratus. Manakala sebanyak 91.7 peratus, seramai 122 orang yang telah diberikan pengampunan dan keringanan hukuman iaitu dikenakan hukuman penjara seumur hidup. (Penekanan ditambah.)

[91] From the Hansard, it is to noted that at the Committee stage during the tabling of the said Bill, there was a proposal by a member of Parliament to substitute the word 'and' at the end of para (2A)(c) for the word 'or'. The Minister in her address stated at the end of the debate during Committee stage addressed the following:

> ... Dalam kata lain, pertimbangan terhadap fasal (2A)(d) adalah wajib dalam setiap kes di mana mahkamah membuat pertimbangan sama ada hendak menjatuhkan hukuman penjara seumur hidup dan sebatan.
>
> Kedudukan ini adalah selari dengan niat di sebalik rang undang-undang pindaan ini yang ingin memperkasakan agensi penguatkuasaan dalam memerangi pengedaran dadah di samping memberikan kuasa budi bicara kepada mahkamah dalam menjatuhkan hukuman selain daripada hukuman mati madatori.
>
> Diperhatikan di sini bahawa faktor-faktor (a), (b) dan (c) berkaitan dengan kesalahan spesifik yamg telah pun dilakukan oleh tertuduh. *Hanya faktor (d) yang berkaitan dengan satu kelebihan yang boleh diperoleh agensi penguatkuasaan dalam usaha mengendalakan pengedaran dadah. Oleh itu, faktor (d) harus wajib dipertimbangkan oleh mahkamah jika niat dan semangant di sebalik pindaan ini hendak dizahirkan iaitu memperkasakan agensi penguat kuasa dalam memerangi pengedaran dadah dan melindungi kepentingan masyarakat*. (Penekanan ditambah.)

[92] The aforesaid in no uncertain terms declared the legislative intent of Parliament in the enacting s 39B(2A). It is worthy to remind ourselves that the role of the courts is to interpret the law passed by the Parliament as it stands and no other.

[93] Having considered all arguments and submissions, we do not find the learned trial judge had misinterpreted the provisions of sub-s 39B(2A) of Act 234.

[94] On the constitutionality point, the issue involved is the validity of s 39B(2A) of Act 234, whether Parliament has no power to legislate the same on the ground that it encroached into the powers and discretion of the Judiciary on the issue of sentencing.

[95] On this constitutionality point, the same issue raised by learned counsel including the principles of separation of powers in the context of criminal cases, have been dealt by the Federal Court in the case of *Letitia Bosman v Public Prosecutor and other appeals (No 1)* [2020] 5 MLJ 277; [2020] 5 MLRA 636, a case on the constitutionality of mandatory death penalty under s 39B of Act 234 and s 302 of the Penal Code. Azahar Mohamed CJM in delivering the majority judgment of the court, inter alia, held:

> [47] It can be seen from the above discussion that as regards to sentencing, the judicial power is to impose punishment in accordance with the law upon conviction of an accused person at the conclusion of a trial. Therefore, the power to determine the measure of punishment or power to prescribe punishment is not part of judicial power.
>
> [48] This leads me to the following question. Which branch of the Government then has the power to determine the measure of punishment or power to prescribe punishment? That question must be examined in the context of the FC ...
>
> [49] Evidently, Parliament derives its legislative power from the FC. The power to legislate is a plenary power vested in Parliament. The issue of legislative competency is to be decided by reference to matters falling within Parliament's power to legislate. What is important in the setting of the present appeals is that the constitutional scheme of the FC empowers Parliament, the legislative of the Government to make law with respect to any of the matters enumerated in cl (1) art 74 of the FC and the Federal List as set out in the Ninth Schedule. The constitutional provisions highlight the fundamental principle relating to the power of Parliament to make law in respect of a particular matter pursuant to the FC. In this regard, Item 4 of the Federal List provides for 'civil and criminal law', including in para (h) 'creation of offences in respect of any of the matters included in the Federal List or dealt with by Federal law'.
>
> ...
>
> [58] The key principles that may be extracted from all the above judgments are as follows:
>
> (i) our Parliament has the legislative power to enact offences. This includes the power to prescribe the punishment for an offence;
>
> (ii) the punishment prescribed by Parliament may be mandatory or discretionary, and may be fixed or within a stipulated range;
>
> (iii) Parliament has the legislative power to prescribe the mandatory death penalty;
>
> (iv) historically, the discretion to determine the measure of punishment is not an inherent or integral part of the judicial power;
>
> (v) the judicial power of the courts is to impose sentence according to law in a particular case; and
>
> (vi) a law of general application prescribing the punishment for an offence does not does not violate the separation of powers.

A [66] Adopting and applying the principles outlined above at [58], it is patently clear that the determination of the measure of punishment is not an integral part of the core judicial function of adjudicating guilt or innocence. On the contrary, it is an integral part of the legislative function of creating offence and prescribing the punishments; in other words, the prescription of the measure of punishment under
B the FC falls under the legislative power and not the judicial power. In the case of *Alma Nudo*, the Federal Court emphasized that based on the doctrine of separation of powers, each component must carry out their powers within their intended limits. Hence under the scheme of our FC, imposing sentence is a judicial power that must be exercised in accordance with the kind and range of punishments
C prescribed by the Legislature. It is for the court to carry out these powers within the limits as provided by the Federal law. The court, in exercising such powers will act according to the provision as prescribed by the law. The court is only empowered to pass any sentence within the parameters of a prescribed sentence enacted by Parliament. The court cannot at its own pleasure impose any sentence as it wishes if
D the law does not permit it. The power of sentencing is statutory and the court cannot exceed or limit the power of sentencing in the name of exercising its judicial power.

E **[96]** Applying the principles enunciated by the majority judgment in the abovementioned case to the appeal before us, it is our judgment that Parliament did not encroach into the power of the court in enacting the legislative prescriptions of factors in paras (a) to (d) of s 39B(2A) of Act 234 to be considered by the court before imposing life imprisonment, as it was within their power to do so.

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[97] We therefore hold that s 39B(2A) of Act 234 is constitutional and does not violate the doctrine of separation of power nor is there any interference with judicial function. As stated in *Letitia Boswan* (at p 667 para [60]), the Court of Appeal in *Kok Wah Kuan* came to a flawed conclusion that the power
G to pass sentence and the power to determine the measure of punishment are both part of the judicial power and that the Federal Court in *Kok Wah Kuan* had set aside the decision of the Court of Appeal.

H **[98]** It is to be noted that our s 39B(2A) of Act 234 is almost identical to the provisions of s 33B of the Misuse of Drugs Act (Chapter 185) of Singapore except that there is no requirement of the certificate from the Public Prosecutor in our sub-s 39B(2A).

I **[99]** The constitutionality of s 33B of the Misuse of Drugs Act was challenged several times. See Singapore Court of Appeal in the case of *Prabagaran a/l Srivijayan v Public Prosecutor and other matters* [2017] 1 SLR 173, *Abdul Kahar bin Othman v Public Prosecutor* [2018] 2 SLR 1394; [2018] SCGA 70.

[100] The Singapore Court of Appeal held that the power to impose punishment is not exclusively judicial and more importantly, the legislative prescription of factors for the courts to take into account in sentencing offenders cannot and does not intrude into the judicial power.

[101] In this regard, we take the position consistent the decision of our apex court in of *Letitia Bosman,* and with the Singapore Court of Appeal.

CONCLUSION

[102] Having considered the factual matrix, we are of the view that the conviction against the appellant was safe. In the circumstances, we unanimously dismiss the appeal. We affirm the conviction and sentence by the High Court.

Appeal dismissed; conviction and sentence of High Court affirmed.

Reported by K Selvaraju